IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DOMINIC R. MARSHALL and RYAN C. CURDY, Plaintiffs, v. WELLS CAPITAL MANAGEMENT INCORPORATED, a California corporation, WELLS FARGO & COMPANY, a Delaware corporation, and MARK COOPER, a citizen of the state of Oregon, Defendants.	No. CV-07-309-HU FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiffs Dominic Marshall and Ryan Curdy bring this action against their former employer Wells Capital Management, Inc. ("WellsCap"), Wells Fargo & Company, and Mark Cooper. Defendants move to dismiss plaintiffs' first, second, third, fifth, seventh, eighth, and ninth claims for failure to state a claim.

I recommend that the motion be granted.

BACKGROUND

The facts are taken from the Complaint. Plaintiffs were employed by WellsCap until October 12, 2006. On or about November 25, 2003, Wells Fargo granted Marshall an option to purchase 15,340 shares of Wells Fargo & Company common stock. A copy of the Wells Fargo Long-Term Incentive Compensation Plan Non-Qualified Stock Option Agreement with Right to Acquire a Reload Stock Option ("Agreement"), between Wells Fargo and Marshall is attached to the Complaint as Exhibit A. The Agreement is subject to the provisions of the Wells Fargo & Company Long-Term Incentive Compensation Plan ("LTIC Plan").[1]

On or about November 25, 2003, Wells Fargo granted Curdy an option to purchase 6,140 shares of Wells Fargo common stock. The Agreement between Wells Fargo and Curdy is attached to the

[1] The LTIC Plan is attached to defendants' motion. Nonetheless, because plaintiffs refer to it in the Complaint, it is appropriate to consider it on a motion to dismiss. E.g., Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (noting the "'incorporation by reference' doctrine, which permits the court to take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading.") (internal quotation and brackets omitted).

Complaint as Exhibit B. This Agreement is also subject to the provisions of the LTIC Plan.

On October 12, 2006, Marshall and Curdy voluntarily resigned from their employment with WellsCap, submitting letters of resignation which were effective immediately. At the time of their October 12, 2006 resignation, Marshall owned 10,266, and Curdy owned 4,093, fully vested stock options under the Agreements.

On or about November 6, 2006, Marshall and Curdy each submitted a Wells Fargo Exercise of Stock Option Form completed with all requested information, to exercise each of their fully vested stock options. Despite demand, WellsCap and Wells Fargo denied plaintiffs' requests to exercise their fully vested stock options and have informed plaintiffs that their fully vested stock options have been "cancelled."

STANDARDS

On a motion to dismiss, the court must review the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. American Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002). However, the court need not accept conclusory allegations as truthful. Holden v Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992).

DISCUSSION

Plaintiffs bring the following nine claims: (1) violation of Oregon Revised Statute § (O.R.S.) 652.610(3) against WellsCap; (2) declaratory judgment to enforce O.R.S. 652.140 against WellsCap, or alternatively, declaratory judgment for plaintiffs' earned and

unpaid wages against WellsCap; (3) penalty wages under O.R.S. 652.150 against WellsCap; (4) breach of contract against WellsCap; (5) breach of implied covenant of good faith and fair dealing against WellsCap; (6) breach of contract against Wells Fargo; (7) breach of implied covenant of good faith and fair dealing against Wells Fargo; (8) tortious breach of implied covenant of good faith and fair dealing against Wells Fargo; (9) breach of fiduciary duty against Wells Fargo.

As noted above, defendants move to dismiss all but the breach of contract claims.

I. First Claim for Relief - O.R.S. 652.610(3)

In addition to the allegations recited above, plaintiffs allege the following in support of their first claim for relief for violation of O.R.S. 652.610(3) against WellsCap: that the fully vested stock options awarded under the LTIC Plan were part of their total pecuniary compensation for services to WellsCap, that WellsCap's interference with plaintiffs' exercise of their fully vested stock options violated O.R.S. 652.610(3), and that they are entitled to actual damages in the amount of at least $86,358.57 and $34,565.39, respectively, as well as prejudgment interest and attorney's fees. Compl. at ¶¶ 10-16.

O.R.S. 652.610 is entitled "Itemized statement of amounts and purposes of deductions required." Subsections (1) and (2) address the provision of an itemized statement of any "sum of money" withheld from the "wages, salary or commission earned by an employee[.]" O.R.S. 652.610(1). Subsection (3) provides that "[n]o employer may withhold, deduct or divert any portion of an employee's wages" unless certain requirements are met. O.R.S.

652.610(3).

Defendants make three arguments in support of their Rule 12(b)(6) motion to dismiss this claim: (1) the statute does not address or prohibit "interference"; (2) the statute does not apply to stock options; and (3) no payment was due.

A. Interference

Defendants note that the plain text of O.R.S. 652.610 generally addresses the payment of and deductions from wages, salary, or commissions. Defendants argue that the statute does not create a cause of action for an alleged "interference" with such payments or deductions. Defendants then argue that because plaintiffs have alleged an "interference," see Compl. at ¶ 13 ("WellsCap's interference with plaintiffs' exercise of their fully vested stock options constituted a violation of ORS 652.610(3)"), plaintiffs fail to state a claim. Furthermore, defendants note, under the facts pleaded in the Complaint, WellsCap did not control whether the options could be exercised because the alleged option agreements were with Wells Fargo.

Plaintiffs note that the actual text of the provision at issue reads that "[n]o employer may withhold, deduct or divert any portion of any employee's wages[.]" O.R.S. 652.610(3). Plaintiffs contend that the common understanding of the word "withhold" as in "withhold" payment, is "'to refrain from paying that which is due.'" Pltf's Mem. at p. 5 (quoting Black's Law Dictionary 1602 (6th ed. 1990)).

Plaintiffs refer to paragraph 9 of their Complaint which is incorporated by reference into the first claim by paragraph 10. In paragraph 9, plaintiffs allege that both WellsCap and Wells Fargo

have failed and refused plaintiffs' requests to exercise their fully vested stock options, informing them that the options have been cancelled. Compl. at ¶ 9.

Referring to facts outside of the Complaint, plaintiffs state that the exercise of stock options in this case involves a series of paper, electronic, and wire transactions which results in a direct deposit of funds into plaintiffs' accounts. Thus, plaintiffs argue, when WellsCap refused to permit plaintiffs to exercise their options, it refused to permit or allow the deposit of money into their accounts and accordingly, it withheld payment of wages which were due. As a result, WellsCap's refusal violates O.R.S. 652.610(3).

Finally, plaintiffs explain that they allege that WellsCap "interfered" with their exercise of the stock options, because until they are able to take discovery, they have no way of alleging precisely how WellsCap stopped the exercise of plaintiffs' options. They contend that they are entitled to discovery as to how WellsCap accomplished the "withholding."

I agree with defendants that plaintiffs' factual assertions about how the exercise of stock options in this case involves a series of paper, electronic, and wire transactions resulting in a direct deposit of funds into plaintiffs' accounts, should not be considered because they are outside of the Complaint. Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1196 (9th Cir. 1998) (court may not consider new facts alleged in the plaintiff's opposition).

However, even if I were to consider them, I reject plaintiffs' argument that the exercise of the option is tantamount to a payment

of money to the employee. At oral argument, plaintiffs' counsel represented that most employees exercise their options under paragraph 2(c) of the Agreements which allows for exercise by delivering a "Notice of Exercise" and "irrevocable instructions to a broker to promptly deliver to [Wells Fargo] the amount of the exercise price and all applicable withholding taxes." Exhs. A & B to Compl. Plaintiffs' counsel explained that this allows an employee to, essentially, exercise the option and sell the stock in one transaction, or as counsel put it, to sell stock the employee does not have. As counsel explained, Wells Fargo sells the stock, keeps the basis, and deposits the difference between the exercise price and the basis into an account for the employee.

The Agreements create three separate methods for exercise, the first two of which are: (1) payment in cash, or (2) payment in whole shares of Wells Fargo common stock, valued at their fair market value. Id. These first two methods require the employee to actually pay something for the shares of stock obtained in the exercise. The third method, described by counsel, is a "series" of transactions which result in a deposit of cash into an employee's account, but which, fundamentally, can best be understood as beginning with a "payment" by the employee to later obtain the net excess proceeds. That is, while the initializing payment may be fictitious, the employee clearly exercises the option only because the exercise price of the shares is below the current fair market value. The employee starts the transaction by instructing a broker to "buy" shares via the exercise, to sell them immediately, to pay Wells Fargo for the exercise of the shares, and then deposit the difference between the exercise price and the higher sale price, in

the employee's account. While this results in a deposit of money for the employee, it begins by the employee essentially borrowing the money from Wells Fargo to "buy" the shares upon exercise, selling them, and repaying Wells Fargo. Thus, the method described by counsel under paragraph 2(c) of the Agreements does not eliminate the employee's purchase of the shares upon the employee's exercise of the option; rather paragraph 2(c) simply collapses several steps, the first one of which is a purchase, into a series of near simultaneous transactions.

I reject plaintiffs' contention that when WellsCap allegedly refused to permit plaintiffs to exercise their options, it refused to permit or allow the deposit of money into their accounts and thus, withheld payment of wages which were due. The allegations do not support a violation of O.R.S. 652.610(3) because the stock options themselves create no payment obligation on behalf of the grantor.

Additionally, as defendants note, plaintiffs fail to allege that WellsCap, the defendant against whom this claim is brought, has withheld or deducted anything. Defendants correctly state that plaintiffs do not allege that WellsCap had any control over the stock option agreements between plaintiffs and Wells Fargo. The statute addresses withholding by the employer. It does not address situations of alleged "interference" by the employer with payment allegedly owed by a third party. I recommend that defendant's motion be granted.

Finally, I see no benefit to allowing plaintiffs leave to amend this claim. The plain language of the Agreements makes clear that the exercise of the stock option requires an actual or

inchoate payment <u>by the employee</u> in order to obtain the shares available in the option grant. Whether the employee chooses to obtain those shares, and what is done with them thereafter, is up to the employee. While in some cases, the employee may simultaneously sell the shares, that is not required under the terms of the Agreements. In the end, that decision is completely up to the employee and is out of the control of WellsCap or Wells Fargo. Because there are no circumstances under which the stock option grant can be seen as creating an obligation of payment from WellsCap, the employer, to plaintiffs, from which an allegedly improper deduction under O.R.S. 652.610(3) could have been made, I recommend that the claim be dismissed without leave to amend.

Because I recommend dismissal of the O.R.S. 652.610(3) claim on this basis, I do not address defendants' alternative arguments for dismissal of this claim.

II. Second Claim for Relief - O.R.S. 652.140

This claim has two counts. Count One is a declaratory judgment claim to enforce O.R.S. 652.140 against WellsCap. The allegations in support of the claim are that plaintiffs' fully vested stock options awarded under the LTIC Plan were part of the total compensation contracted to be paid for plaintiffs' personal services to their employer, WellsCap. Compl. at ¶ 18. Under O.R.S. 652.140, all of plaintiffs' earned and unpaid wages became due and payable as a matter of law within five days, excluding Saturdays, Sundays, and holidays, after plaintiffs' resignations. <u>Id.</u> at ¶ 19. Plaintiffs contend they are entitled to a declaration that WellsCap's interference with their exercise of their fully vested stock options constituted a violation of O.R.S. 652.140, and

that they are further entitled to an order compelling WellsCap to immediately execute plaintiffs' request to exercise their options. Id. at ¶ 20. They further contend that in the event that the cash value of plaintiffs' stock options at the time of execution is less than the cash value of the options as of November 6, 2006, plaintiffs are entitled to judgment in an amount representing the cash difference. Id. Plaintiffs also seek prejudgment interest and attorney's fees. Id. at ¶¶ 21, 22.

In Count Two, brought as an alternative to Count One, plaintiffs reallege paragraphs 18, 19, and 22, but instead of seeking a declaratory judgment, they contend that pursuant to O.R.S. 652.140, they are entitled to payment of their earned and unearned compensation in the amount of at least $86,358.57 and $34,565.39, respectively. Id. at ¶¶ 23, 24.

Plaintiffs do not specifically identify which subsection of O.R.S. 652.140 they contend defendants violated, but it appears they rely on subsection (2) which provides that if an employee does not give forty-eight hours notice of quitting, "all wages earned and unpaid at the time" of quitting are due and payable within five days, excluding Saturdays, Sundays, and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs. O.R.S. 652.140(2).

Defendants argue that the claim must be dismissed because the statute governs only wages earned and unpaid at the time of quitting and here, the stock options were not earned and unpaid at the time of quitting because plaintiffs had not yet satisfied the condition precedent of delivering the notice of exercise.

Defendants cite State ex rel. Roberts v. Duco-Lam, Inc., 72 Or. App. 473, 696 P.2d 561 (1985), State ex rel. Roberts v. Public Finance Co., 294 Or. 713, 662 P.2d 330 (1983), and Walker v. American Optical Corp., 265 Or. 327, 509 P.2d 439 (1973), in support of their argument, in addition to relying on the statutory language. The three cases suggest that an employer does not violate O.R.S. 652.140 by waiting until the satisfaction of a condition precedent to pay wages earned and unpaid at the time of termination, even if the date such wages are paid is after the O.R.S. 652.140 statutory time period. Thus, in Duco-Lam, the court held that wages earned, but not paid by virtue of an agreement between the employees and the employer arising out of poor market conditions, were not due and payable upon the employees' termination, but only upon the later occurrence of the condition precedent to repayment, which was increased profits generated by improved market conditions. Duco-Lam, 72 Or. App at 477-78, 696 P.2d at 563.

Similarly, in Walker, the court held that the plaintiff was not entitled to penalty wages under O.R.S. 652.150 for failure to timely pay wages upon termination, because even assuming bonus plan payments were wages, the payments were not "due and owing" at the time of termination when there was a failure of the employee to satisfy the condition precedent to payment - being on the payroll at the time the bonuses were distributed. Walker, 265 Or. at 333, 509 P.2d at 442.

In Public Finance, the court held that the employee was not entitled to collect vacation pay when the employment contract provided that "vacation entitlement is established on the

employee's anniversary date with the Company," and the employee was terminated three days before his anniversary. Public Finance, 294 Or. at 716, 662 P.2d at 332.

Defendants argue that the stock options in this case are not payable until the time of exercise. Because plaintiffs admit they did not attempt to exercise their options until approximately one month after their resignations, defendants contend that there is no violation of O.R.S. 652.140(2).

Plaintiffs argue that WellsCap violated the statute because, by virtue of plaintiffs' continuous employment with WellsCap from November 25, 2003, through November 25, 2005, plaintiffs "earned" the right to exercise two-thirds of their covered options. Because, plaintiffs argue, their vested options were earned and unpaid at the time of resignation, WellsCap violated O.R.S. 652.140(2).

I reject this argument. First, this claim suffers from the same problem as the O.R.S. 652.610(3) claim in that plaintiffs bring the claim against WellsCap, their employer, but, any failure to promptly pay any "earned and unpaid wages" at the time of quitting is attributable to Wells Fargo, not to WellsCap.

Second, while plaintiffs' continuous employment for the two years beginning November 23, 2005, resulted in two-thirds of the shares subject to the grant being vested, or exercisable, all that plaintiffs "earned," in plaintiffs' parlance, was the right to exercise a stock option. Even assuming for the purposes of this discussion that a vested stock option is "wages" under O.R.S. 652.140, I agree with defendants that any payment of such "wages," was subject to the condition precedent of plaintiffs actually

exercising the option. Because they failed to do so before or at the time of termination, nothing was "unpaid" to them at that time. Thus, any failure to pay them within the five days is not a violation of O.R.S. 652.140(2).

Plaintiffs further contend that Oregon cases, and O.R.S. 652.120, recognize that employers and employees may agree to a "deferred payment" of wages and under such circumstances, an employer violates O.R.S. 652.140 by failing to pay wages which were earned and unpaid at the time of resignation, at the agreed upon "deferred payment" date. O.R.S. 652.120 requires employers to establish regular paydays. Subsection (4) allows an employer to enter into a written agreement, prior to the rendering of any services, and mutually satisfactory with the employees, as to the payment of wages at a future date.

Plaintiffs rely on Crofoot v. Columbia-Willamette Air Pollution Auth., 31 Or. App. 903, 571 P.2d 1266 (1977), and Miller v. CC Meisel Co., Inc., 183 Or. App. 148, 51 P.3d 650 (2002). In Miller, the plaintiff prevailed on a contract theory for monies he alleged he was owed. The trial court concluded that the monies owed under the contract were "wages" within the meaning of O.R.S. Chapter 652 and entered judgment for the plaintiff on the contract claim and a parallel claim for "unpaid compensation." Id. at 153, 51 P.3d at 655. The court then awarded the plaintiff attorney's fees under O.R.S. 656.200 for the "unpaid compensation" claim. Id.

One of the defendant's arguments on appeal was that under the "unpaid compensation" claim, no wages were capable of calculation at the time of termination because the plaintiff himself had to complete certain financial statements before the defendant's value

could be accurately assessed and the plaintiff had failed to accomplish this task. The appeals court rejected this argument. It explained that because the plaintiff had given the defendant eight or nine months' notice of his retirement, the defendant had had plenty of time to calculate the sum due. Id. at 161, 51 P.3d at 659. Moreover, the court explained, even if the plaintiff agreed to postpone the payment of his compensation for a certain period of time while the parties negotiated the sum due, the wages became payable upon demand when the negotiations failed. Id.

In Crofoot, both the trial court and the Court of Appeals concluded that the plaintiff was entitled to four weeks of severance pay. The evidence showed that while the plaintiff would ordinarily have been due the severance pay upon his June 30, 1973 termination, he wrote to the employer and asked for payment to be delayed because he hoped to continue his employment in government and then transfer his benefits to another government agency. 31 Or. App. at 910, 571 P.2d at 1270. However, the plaintiff was unable to secure government employment and requested his severance pay on February 6, 1974. The employer failed to pay.

The trial court concluded that the severance pay was due on June 30, 1973, the date of termination, and that the employer's failure to pay it then was willful, rendering it liable for penalty wages under O.R.S. 652.150. On appeal, the employer argued that it was not liable for the penalty wages because its action was not willful, given the plaintiff's waiver of immediate payment.

The Court of Appeals partially rejected the defendant's argument. Id. at 911, 571 P.2d at 1270-71. The court agreed that given the plaintiff's request to delay payment, the severance pay

was not immediately payable on June 30, 1973, the date of termination. Id. But, the court held that the initial waiver did not act as a waiver of the employer's duty to make immediate payment when the plaintiff made his demand for payment in February 1974. Id.

I agree with plaintiffs that Miller and Crofoot recognize that the parties can mutually agree to extend the time for payment of wages earned and unpaid at the time of termination, beyond the time required in the statute. The problem for plaintiffs here is that unlike the severance pay in Crofoot, which was clearly owed to the employee and which the employee expressly desired to receive, and unlike the monies owed to the plaintiff in Miller, which were also clearly owed to the employee and which the employee expressly desired to receive, a stock option, even one that is vested, is no more than an option to purchase stock.

Unlike the severance pay at issue in Crofoot, or the monies owed upon retirement in Miller, plaintiffs here could have exercised the stock options at issue in this case any time after November 25, 2005. Thus, plaintiffs themselves could have triggered a "payment" even before their resignations. Also, unlike the severance pay at issue in Crofoot, and the monies owed in Miller, plaintiffs here could choose never to exercise the stock options. This is especially true if the selling price of the stock was below the exercise price. Thus, unlike the employer in Crofoot, which agreed with plaintiff to simply defer a payment to which plaintiff was unconditionally entitled, defendants here had no knowledge that any "payments" would be due and payable, ever. Miller and Crofoot address situations where an employee has an

enforceable right to payment at the time of termination and agrees to delay that payment. In contrast, plaintiffs in the instant case did not agree at the time of resignation, to an exercise date one month later. There was no "mutual agreement" between plaintiffs and defendants in this case, to defer anything which had actually accrued to plaintiffs.

The more appropriate description for the stock options is that they were earned, or became vested, by virtue of plaintiffs' continuous employment from November 23, 2003, to November 23, 2005, and were "delivered." That is, the option to purchase two-thirds of the shares in the grant ripened, but because exercise of those options was completely in the employees' control, there was no obligation to "pay," either at the time of termination or at a mutually agreed upon deferred time, until the actual exercise. Under these circumstances, the facts alleged here do not state a claim under O.R.S. 652.140. Given my conclusion, I further recommend that amendment would be futile.

Alternatively, plaintiffs argue that even if I accept defendants' argument that O.R.S. 652.140 does not apply to this case, plaintiffs are nonetheless entitled to seek the relief sought in the prayer for this claim. The prayer for this claim seeks (1) a decree ordering defendants to immediately execute plaintiff's request to exercise their stock options and for judgment in the amount of any deficiency, or, judgment in the amount of $86,358.57 for Marshall, and $34,565.39 for Curdy; (2) prejudgment interest; and (3) attorney's fees pursuant to O.R.S. 652.200(2).

Plaintiffs argue that none of the relief sought in this prayer requires a determination that O.R.S. 652.140 was violated.

Plaintiffs argue that based solely on their rights under the Agreements, and entirely independent of O.R.S. 652.140, they are entitled to seek a decree ordering WellsCap to immediately execute their requests to exercise their options and that they need not prove that O.R.S. 652.140 was violated to be entitled to an award for unpaid wages. Moreover, they argue that they are still entitled to seek attorney's fees under O.R.S. 652.200(2) which applies to any action for the collection of wages if the wages were not paid for a period of forty-eight hours after they became due and payable.

I reject this argument. The prayer does not stand on its own. Plaintiffs must assert a right to relief in conjunction with the claim that they contend entitles them to obtain that relief. I recommend that while this claim should be dismissed, leave to amend should be given to reassert the relief sought in the prayer for this claim, as relief sought on another pending claim. A deadline for such an amendment will be discussed in a telephone scheduling conference which my Courtroom Deputy will arrange.

III. Third Claim for Relief - O.R.S. 652.150

O.R.S. 652.150 allows for penalty wages for a willful violation of O.R.S. 652.140. Because I recommend that the O.R.S. 652.140 claim be dismissed, I recommend that the O.R.S. 652.150 claim be dismissed as well.

IV. Fifth and Seventh Claims for Relief - Breach of the Implied Covenant of Good Faith & Fair Dealing

The fifth claim is asserted against WellsCap. Plaintiffs allege that WellsCap's failure to facilitate payment and its active interference with plaintiffs' exercise of their fully vested stock

options breached the implied covenant of good faith and fair dealing inherent in the contractual relationship between plaintiffs and WellsCap. Compl. at ¶ 38. Plaintiffs allege that they are entitled to compensatory damages of at least $86,358.57 (Marshall), and $34,565.39 (Curdy). Id. at ¶ 39. They also seek prejudgment interest from the date they submitted the stock option exercise form, to the date of judgment. Id. at ¶ 40.

The Seventh Claim is against Wells Fargo. Plaintiffs allege that the actions of Wells Fargo in refusing plaintiffs' request to exercise their fully vested stock options and purportedly canceling plaintiffs' stock options, breached the covenant of good faith and fair dealing inherent in the Agreement. Compl. at ¶ 46. Plaintiffs seek compensatory damages in the amounts of, at least, $86,358.57 (Marshall), and $34,565.39 (Curdy). Id. at ¶ 47. They also seek prejudgment interest at the legal rate from the date they submitted their exercise form to the date of judgment. Id. at ¶ 48.

There is an implied obligation of good faith in the performance and enforcement of every contract. Zygar v. Johnson, 169 Or. App. 638, 645, 10 P.3d 326, 330 (2000) ("Every contract contains an implied covenant of good faith and fair dealing, one that serves to protect objectively reasonable contractual expectations of the parties."). Claims alleging breach of the contractual duty of good faith may be pursued independently of a claim for breach of an express contract term. McKenzie v. Pacific Health & Life Ins. Co., 118 Or. App. 377, 381, 847 P.2d 879, 881 (1993).

Although the implied duty of good faith and fair dealing

exists even in contracts without discretionary provisions, id., it cannot contradict an express contractual term, nor otherwise provide a remedy for an unpleasantly motivated act that is permitted expressly by the contract. Zygar, 169 Or. App. at 645, 10 P.3d at 330. To sustain a claim, a plaintiff must assert conduct by the defendant that violated the plaintiff's objectively reasonable contractual expectations. Uptown Heights Assoc. Ltd P'ship v. Seafirst Corp., 320 Or. 638, 645, 891 P.2d 639, 643 (1995). Conduct consistent with the terms of the contract cannot serve as the basis of a claim of violation of the duty of good faith.

"[T]he terms of a contract help serve to define the objectively reasonable expectations of the parties [which the implied duty of good faith protects]. As a corollary to that proposition, a party invoking an express contractual right does not, merely by doing so, violate the duty of good faith." Zygar, 169 Or. App. at 645, 10 P.3d at 330 (internal quotation omitted).

I recommend that these claims be dismissed. First, as to the claim against WellsCap, I note that the Complaint does not clearly aver the existence of a contract between plaintiffs and WellsCap. The LTIC Plan and the Agreements are contracts between plaintiffs and Wells Fargo. The background facts assert no contractual relationship between WellsCap and plaintiffs. Compl. at ¶¶ 1-9. In support of the O.R.S. 652.610(3) claim against WellsCap, plaintiffs allege that their fully vested stock options awarded under the Agreements were part of their total pecuniary compensation for services to their employer, WellsCap. Id. at ¶ 11. In support of their fourth claim, a claim of breach of

contract against WellsCap, they allege that their fully vested stock options awarded under the Agreements were a material part of the compensation contracted for plaintiffs' personal services to WellsCap. Id. at ¶ 32. Even assuming these allegations show the existence of a contract between WellsCap and plaintiffs, they are not incorporated by reference into the allegations supporting the fifth claim alleging that WellsCap breached the contractual duty of good faith and faith and fair dealing. As should be clear from the standards outlined above, without a contract, there is no implied duty of good faith. Thus, the claim against WellsCap should be dismissed for this reason alone.

The more fundamental problem with these claims is that defendants' cancellation of plaintiffs' vested stock options was either permitted under the Agreements and the LTIC Plan, or it was not. The written documents, explained in more detail below, expressly address the right to exercise options upon termination from employment. Here, defendants' conduct was either consistent with the express terms of the documents, in which case it was permissible, or it was not, in which case the appropriate claim is one for breach of contract. If plaintiffs' interpretation of the documents is correct, they had three months after a voluntary resignation in which to exercise their stock options. If defendants' interpretation of the documents is correct, the options were not exercisable after they resigned. The issue is which interpretation governs the parties' relationship, not whether a contract was performed in good faith.

The Agreement for each plaintiff provides that if the employee leaves employment for reasons other than death, permanent

disability, retirement, or discharge for cause, the employee may still exercise any part of the option which was exercisable on the date of termination, any time within three months after the date of termination. Exhs. A & B to Compl. at ¶ 3.

The Agreements also state, however, that the stock "[o]ption is granted subject in all respect to the terms of the Company's Long-Term Incentive Compensation Plan (the 'Plan')." Exhs. A & B to Compl. at ¶ 1. The Agreements expressly provide that they are subject to the provisions of the LTIC Plan. Id. at ¶ 9. They further expressly state that "[i]f the Plan and this Agreement are inconsistent, provisions of the Plan will govern. Interpretations of the Plan and this Agreement by the Committee are binding on you and the Company." Id.

The LTIC Plan contains a provision which appears to contradict the termination provisions of the Agreements. The LTIC Plan has a section governing the exercise of options upon the death, disability, or retirement of an employee. Exh. 1 to Defts' Mtn at ¶ 10.2. It has a separate paragraph for termination of employment for reasons other than death, disability, or retirement. Id. at ¶ 10.3. This provision states that "[e]xcept as otherwise determined by the Committee, in the event a Participant ceases to be an Employee for any reason other than his death, permanent disability or Retirement, all rights of the Participant under this Plan shall immediately terminate without notice of any kind." Id.

The Agreement terms are at odds with the language in the LTIC Plan regarding the continued right to exercise vested options upon termination other than for death, disability, or retirement. Because the Agreements provide that the LTIC Plan controls in the

event of an inconsistency, defendants contend that there is no breach of an implied duty of good faith.

Plaintiffs argue that the Agreements are not inconsistent with the LTIC Plan. Plaintiffs point to paragraph three of the LTIC Plan, labeled "Administration." Exh. 1 to Defts' Mtn. at ¶ 3. It provides, in pertinent part, that "[t]he Plan shall be administered by the Committee. Subject to the provisions of the Plan, the Committee shall have exclusive power to determine when and to whom Awards will be granted, the form of each Award, the amount of each Award, and any other terms or conditions of each Award." Id. The LTIC Plan defines "Committee" as a "committee selected by the Board and consisting of two or more members of the Board." Id. at ¶ 2.1(d).

In paragraph 10.1, the LTIC Plan provides that an award of an option is subject to

> such terms, conditions and restrictions as the Committee shall determine, subject to the provisions of this Plan, including the following:
>
> . . .
>
> (c) Exercise Term. A statement of the Term of each Option granted as established by the Committee, provided that no Option shall be exercisable after ten years from the date of grant.

Id. at ¶ 10.1.

Plaintiffs note that paragraph 10.3, relied on by defendants and providing that exercise rights immediately terminate upon cessation of employment for any reason other than death, permanent disability, or retirement, is preceded by the phrase, "[e]xcept as otherwise determined by the Committee." Id. at ¶ 10.3. Plaintiffs contend that by issuing the Agreements with the express provision

that plaintiffs' vested options were to remain exercisable for three months after a voluntary resignation, the Committee determined the terms of their exercise in full compliance with the LTIC Plan, and thus, construed this way, there is no inconsistency and the three-month post-termination period of exercise applies.

While highlighting this contract interpretation dispute is necessary to demonstrate why the facts do not support a breach of an implied duty of good faith claim, resolving the contract interpretation dispute is not required here. The point is that either defendants' interpretation or plaintiffs' interpretation accurately reflects the terms of the exercise period. In either case, it is simply conduct consistent with an express contract term, or conduct inconsistent with such a term, that is at issue. There is no basis for a breach of a covenant of good faith claim. I recommend that these two claims be dismissed with prejudice.

V. Eighth and Ninth Claims for Relief - Tortious Breach of the Duty of Good Faith and Breach of Fiduciary Duty

These claims are both brought against Wells Fargo. In the eighth claim, for tortious breach of the implied covenant of good faith and fair dealing, plaintiffs allege that by virtue of its position of trust and reservation of discretion under the LTIC Plan and the Agreement, Wells Fargo stood in a position of a special relationship with plaintiffs. Compl. at ¶ 50. Plaintiffs further allege that Wells Fargo's action in refusing plaintiffs' request to exercise their fully vested stock options and purportedly canceling the options constituted a breach of the covenant of good faith and fair dealing inherent in the Agreement. Id. at ¶ 51. Plaintiffs seek compensatory damages, prejudgment interest, and punitive

damages. Id. at ¶¶ 52-54.

In the ninth claim, breach of fiduciary duty, plaintiffs allege that by virtue of its position of trust and reservation of discretion under the LTIC Plan and the Agreement, Wells Fargo owed plaintiffs a fiduciary duty of loyalty in administering the LTIC Plan and Agreement. Id. at ¶ 56. Plaintiffs contend that by refusing to permit plaintiffs to exercise the options, and purportedly canceling them, Wells Fargo breached its fiduciary duty of loyalty in one or more of the following ways: (1) failing to act in good faith; (2) failing to investigate in good faith the claim of Cooper and WellsCap that plaintiffs had been discharged for cause; (3) failing to act for plaintiffs' best interest; and (4) acting in its own financial self interest and that of its subsidiary to the detriment of plaintiffs. Id. at ¶ 57. As with the eighth claim, plaintiffs seek compensatory damages, prejudgment interest, and punitive damages on the ninth claim as well. Id. at ¶¶ 58-60.

Defendants move to dismiss these claims on the basis that there is no special relationship between the parties. Defendants argue that while plaintiffs have pleaded the existence of a "special relationship" in a conclusory fashion, plaintiffs fail to plead facts supporting the type of special relationship that Oregon law requires to support either of these two claims.

As explained by the Oregon Court of Appeals in a 1997 case,

> [u]nder either theory breach of fiduciary duty or the tortious breach of duty of good faith and fair dealing, plaintiff was required to present evidence that a special relationship or fiduciary-type relationship existed between the parties that was independent of the duties under the [contract].

Bennett v. Farmers Ins. Co., 150 Or. App. 63, 79, 945 P.2d 595, 604 (1997), aff'd in part, rev'd in part on other grounds, 332 Or. 138, 26 P.3d 785 (2001).

In Conway v. Pacific University, the Oregon Supreme Court addressed the issue of a "special relationship" giving rise to tort liability as opposed to contract liability. 324 Or. 231, 924 P.2d 818 (1996). The court listed several types of relationships it had previously found carried a heightened duty of care. Id. at 239-40, 924 P.2d at 823-24. It then stated that

> [a]nother way to characterize the types of relationships in which a heightened duty of care exists is that the party who owes the duty has a special responsibility toward the other party. This is so because the party who is owed the duty effectively has authorized the party who owes the duty to exercise independent judgment in the former party's behalf and in the former party's interest. In doing so, the party who is owed the duty is placed in a position of reliance upon the party who owes the duty; that is, because the former has given responsibility and control over the situation at issue to the latter, the former has a right to rely upon the latter to achieve a desired outcome or resolution.
>
> This special relationship exists in situations . . . in which one party has relinquished control over the subject matter of the relationship to the other party and has placed its potential monetary liability in the other's hands. In all those relationships, one party has authorized the other to exercise independent judgment in his or her behalf and, consequently, the party who owes the duty has a special responsibility to administer, oversee, or otherwise take care of certain affairs belonging to the other party.

Id. at 240-41, 924 P.2d at 824; see also Schukart v. State Farm Mut. Auto. Ins. Co., No. CV-04-6242-AA, 2006 WL 456260, at *4 (D. Or. Feb. 22, 2006) (citing Bennett and Conway for proposition that under the theory of tortious breach of duty of good faith and fair dealing, plaintiff must present evidence that a special relationship or fiduciary-type relationship existed between the

parties that was independent of their contractual relationship).

In response to the motion, plaintiffs rely on two arguments. First, they contend that the stock option grant created by the LTIC Plan and the Agreements is, in essence, a trust, and that Oregon courts recognize that a trustee-beneficiary relationship is a "special relationship" for purposes of a tortious bad faith or breach of fiduciary duty claim. Second, they contend that the stock option grant should be viewed as similar to other benefit plans provided by Wells Fargo, such as a 401(k) plan, which create a fiduciary relationship between Wells Fargo and the employee. Plaintiffs argue that there is no reason to distinguish the stock option grant from other benefit programs and it should be treated as similarly providing a "fiduciary type" relationship.

I reject these arguments. As to the trust theory, while I agree with plaintiffs that Oregon recognizes a trustee-beneficiary relationship as a "special relationship," e.g., SFG Income Fund, LP v. May, 189 Or. App. 269, 279, 75 P.3d 470, 475 (2003) (trustees owe a heightened duty to act in the best interests of their beneficiaries as well as a duty to act in good faith), I do not view the allegations and the documents governing the stock option grants in this case as creating a trust. First, plaintiffs cite no Oregon, or other, cases holding that a stock option agreement creates a beneficiary-trustee relationship.

Second, Oregon courts generally describe a trust as "'an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him to apply or deal with property for the benefit of some other person, or for the benefit of himself and another or others, according to such

confidence.'" Lozano v. Summit Prairie Cattlemens Ass'n, 155 Or. App. 32, 37, 963 P.2d 92, 95 (1998) (quoting Templeton v. Bockler, 73 Or. 494, 506, 144 P. 405 (1914)). Notably, "[a] mere contractual obligation, including a contractual promise to convey property, does not create a trust." Id. at 38, 963 P.2d at 96.

Here, the facts alleged do not support plaintiffs' contention that Wells Fargo held any property for another's benefit. No part of the Agreement or the LTIC Plan suggests that Wells Fargo had any obligation to do anything in particular with the shares of stock that it made available to employees. No facts show that Wells Fargo had any express duty to act in plaintiffs' interests. Rather, the LTIC Plan expressly provides that its primary purpose is to produce a superior return to stockholders. Exh. 1 to Defts' Mtn at ¶ 1.

Third, under the Restatement of Trusts, which Oregon courts frequently rely on, e.g., Kidney Ass'n of Or., Inc. v. Ferguson, 315 Or. 135, 144, 843 P.2d 442, 447 (1992), "an interest subject to a condition subsequent is not, because of the condition, held in trust." Restatement of Trusts (Second) § 11 (1959). As noted by one court, "stock option agreements are contracts subject to a contingency[.]" DeNadai v. Preferred Capital Mkts., 272 B.R. 21, 34 (Bankr. D. Mass. 2001). The stock option grant in this case is subject to several contingencies, including being employed for a certain period of time, not being discharged for cause, and timely exercise of the option. Given these "conditions subsequent," the stock option documents create no trustee-beneficiary relationship.

Similarly, I conclude that the stock option agreement does not create a "fiduciary type" relationship. At oral argument,

plaintiffs' counsel contended that there was no distinction between Wells Fargo's administration of its 401 plan, and its administration of this LTIC Plan, and thus, the Court should find a "fiduciary type" relationship inherent in the administration of the LTIC Plan similar to the one existing in the administration of the 401 plan.

Differences in the nature of the benefits offered by a 401 plan and stock option plan counsel against finding a fiduciary duty in the latter simply because one exists in the former. Under a typical 401 plan, a certain portion of the employee's earned and accrued wages are diverted to a fund, managed by the employer or the employer's designee. Some employers also make "matching" contributions to the fund. Some employers require an employee to be employed a certain number of years before that matching contribution is irrevocable. Nonetheless, the contribution made by the employee him or herself out of the employee's accrued wages, represents a transfer of actual assets from the employee to the fund.

In contrast, the stock option agreement creates only a right for the employee to act. It does nothing more. If the option has vested by virtue of the employee's continuous employment for the designated period of time, there still is no asset to manage or protect until, and most importantly <u>unless</u>, the employee exercises the option. Under the LTIC Plan and the Agreements, there is no creation or transfer of an asset for Wells Fargo to manage or administer. Because of the contingency of exercise, the "asset" is nonexistent.

Thus, unlike a 401 plan, the LTIC Plan contains no provision

imposing any obligation on Wells Fargo to administer assets, or otherwise act on plaintiffs' behalf. Plaintiffs give no assets to the Committee to administer or manage. The stock option agreements are distinguishable from 401 and other benefit plans.

Notably, "parties to a contract are in a 'special relationship' imposing a heightened duty of care and thereby creating potential tort liability when one party delegates to the other the authority to make important decisions with the understanding that the authority is to be exercised on behalf of and for the benefit of the authorizer." Jones v. Emerald Pac. Homes, Inc., 188 Or. App. 471, 478, 71 P.3d 574, 579 (2003). Here, plaintiffs do not, under the stock option agreements, delegate any authority to defendant to make any decision. Thus, the relationship does not qualify as "special" to support a tort claim.

CONCLUSION

I recommend that defendants' motion to dismiss (#6) plaintiffs' first, second, third, fifth, seventh, eighth, and ninth claims, be granted, and that the dismissal be with prejudice for all claims.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due December 13, 2007. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

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If objections are filed, a response to the objections is due December 27, 2007, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 28th day of November, 2007.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge